

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1406

COMMONWEALTH

vs.

SAMUEL K. WAITHAKA.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant, Samuel K. Waithaka, pleaded guilty in the District Court to a criminal complaint charging improper storage of a firearm, possession of a firearm with a defaced serial number, and possession of a firearm without a firearm identification card. The judge sentenced him to two years of probation. Almost three years later, the defendant filed a motion to withdraw his guilty plea on the ground that the Commonwealth had failed to establish a factual basis for the charges. The same judge who had accepted the guilty plea denied the motion. The defendant appeals.

"A judge may not accept a guilty plea 'unless there are sufficient facts on the record to establish each element of the offense.'" Commonwealth v. Hart, 467 Mass. 322, 325 (2014), quoting Commonwealth v. DelVerde, 398 Mass. 288, 297 (1986).

The defendant claims that the record was insufficient to establish an element common to all three charges, that he possessed a "firearm" within the meaning of the criminal statutes, specifically, that the gun was capable of discharging a bullet. See Commonwealth v. Nieves, 43 Mass. App. Ct. 1, 2 (1997).

In her recitation of the facts during the guilty plea colloquy, the prosecutor stated that the Worcester police responded to a 911 call reporting a person with a gun. Brittany Pena, who lived with the defendant and was the mother of two of his children, led the officers inside their apartment to a bedroom where the officers recovered the weapon. It "appeared to be a working firearm, and the serial number was defaced." Pena explained that the defendant had tried to kill himself by placing the gun inside his mouth and pulling the trigger, but "[t]he gun did not fire at that time." Frustrated, the defendant "placed the gun in his usual hiding place, which was under the crib mattress." Defense counsel, seeking leniency in sentencing because the crimes centered around an attempted suicide, commented, "[F]ortunately, he doesn't know how to use a gun very well." The defendant admitted that he had the gun in the house without a license to carry or a firearm identification card, that it was not properly stored, and that it had some defaced serial numbers.

While these facts did not definitively prove operability,¹ they were enough for the judge to accept the defendant's plea. The factual basis for a guilty plea need not satisfy the standard of proof beyond a reasonable doubt. See Commonwealth v. Armstrong, 88 Mass. App. Ct. 756, 758 (2015). "Rather, a plea judge 'need determine only whether the evidence which he had heard, plus any information he has obtained in the plea hearing, is sufficient, when considered with reasonable inferences which may be drawn therefrom, to support the charge to which the defendant is offering a plea of guilty.'" Id., quoting Commonwealth v. Jenner, 24 Mass. App. Ct. 763, 773 (1987).

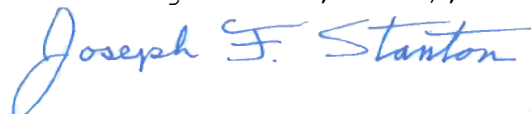
The prosecutor's representation that the gun appeared to be in working order, combined with the facts that the defendant's handling of the weapon provoked a 911 call and a police response, that he usually kept it hidden, and that he intended to use it to end his life, permitted a reasonable inference that the gun was capable of discharging a bullet. The defendant's admissions contribute to the calculus. Unlike the crime of

¹ At the motion hearing, the Commonwealth produced evidence that the gun had been test fired and certified as a working firearm on February 3, 2015, well before the guilty plea proceedings held on September 28, 2015. Because the ballistics certificate was not made a part of the record at the plea colloquy, however, the Commonwealth cannot rely on it to establish the factual basis. See Hart, 467 Mass. at 327 n.9. The better practice would have been for the Commonwealth to offer the certificate during the colloquy.

resisting arrest, which is "an intensely factual, nuanced inquiry that must consider the nature of the defendant's conduct or actions and the sequence of those actions in relation to corresponding action by the police officers involved," Hart, 467 Mass. at 328, the question whether a weapon qualifies as a firearm is straightforward. The information available permitted the judge to be satisfied that the defendant committed the crimes to which he pleaded guilty.

Order denying motion to
withdraw plea affirmed.

By the Court (Green, C.J.,
Massing & Shin, JJ.²),



Clerk

Entered: July 11, 2019.

² The panelists are listed in order of seniority.